United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7048

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Case No. 75-7048

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P/S

NATURAL RESOURCES DEFENSE COUNCIL, INC., ENVIRONMENTAL DEFENSE FUND, INC., THE LONG ISLAND SOUND TASKFORCE, THE FISHERS ISLAND CIVIC ASSOCIATION, INC., FISHERS ISLAND LOBSTERMEN'S ASSOCIATION, INC., CONNECTICUT CITIZENS ACTION GROUP, NORTH FORK ENVIRONMENTAL COUNCIL, INC., and THE LEAGUE OF WOMEN VOTERS OF RIVERHEAD-SOUTHOLD,

Plaintiffs-Appellants,

- and -

STATE OF NEW YORK,

Intervenor-Appellant,

- against -

HOWARD H. CALLAWAY, as Secretary of the Army; LT. GENERAL WILLIAM C. GRIBBLE, JR., as Chief of Engineers, United States Army; COLONEL JOHN H. MASON, as Division Engineer, New England Division, Corps of Engineers, United States Navy; J. WILLIAM MIDDENDORF, as Secretary of the Navy; CAPT. C.C. HEID, as Commanding Officer, Northern Division, Naval Facilities Engineering Command, Department of the Navy; RUSSELL E. TRAIN, as Administrator of the U.S. Environmental Protection Agency; and JOHN A.S. McGLENNON, as Regional Administrator, Region I, U.S. Environmental Protection Agency,

Defendants-Appellees.

BRIEF OF PLAINTIFFS-APPELLANTS

Dated: March 11, 1975

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BRIEF OF PLAINTIFFS-APPELLANTS

INTRODUCTORY STATEMENT

Plaintiffs appeal to this Court from a final judgment of the District Court of Connecticut which denied

injunctive relief against the dumping of 2.8 million cubic yards of polluted dredged spoils into Long Island Sound off New London.

The dumping itself continues underway at this time. However, the second phase of the project, which involves the most severely polluted spoils, is not scheduled to begin until sometime in 1976. Accordingly, it is not too late to avoid the most serious damage, and plaintiffs have therefore filed this appeal seeking reversal of the District Court's judgment entered on December 30, 1974 [A. 109].*

The judgment followed the filing of a memorandum of decision (not as yet officially reported, but reproduced in the appendix at A. 42) signed by United States District Judge M. Joseph Blumenfeld on December 13, 1974.

In reaching his decision, Judge Blumenfeld concluded initially that he did not have jurisdiction to consider plaintiffs' claims that the dumping was in violation of the Federal Water Pollution Control Act [33 U.S.C. §1251 et seq] (hereinafter, the "Water Act") because plaintiffs had commenced this action less than 60 days after demand had been made on

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* The prefix "A" denotes references to the pages of the Appendix filed with this brief.

the cognizant agencies. The Judge found that the United States Navy, which is undertaking the dumping, and the Corps of Engineers, which granted the required permit, had adequately complied with the National Environmental Policy Act [42 U.S.C. §§4321 et seq] ("NEPA") in reaching their decision to use New London for the spoil disposal. On this basis, injunctive relief was denied.

ISSUES PRESENTED FOR REVIEW

1. Whether the courts have jurisdiction to enjoin violations of the Water Act, when a citizens' suit is commenced less than 60 days after notice of violation is given to the responsible Federal agencies?

2. Whether the Corps of Engineers, which was the permitting agency in this case, could base its decision on an environmental impact statement ("EIS") prepared by the permit applicant, here the United States Navy?

3. Whether the EIS prepared by the Navy in this case was adequate when it did not identify or discuss projected plans for additional spoil dumping in Long Island Sound, including dumping at New London?

4. Whether the requirement of NEPA that an EIS accompany proposals for Federal action through each step of the decision-making process was violated when the Corps of

Engineers rejected the dumping site recommended in the EIS before it, and directed the use of New London, which was not mentioned in the EIS?

5. Whether the District Court used a proper standard for review when it invoked a procedural "rule of reason" to justify the failure of the EIS to discuss in detail admittedly feasible alternatives?

STATEMENT OF THE CASE

A. Nature of the Case

Plaintiffs are eight citizens groups from New York and Connecticut concerned with the protection of the environment generally and, in this case, concerned specifically with the ecological health of Long Island Sound and its marine resources. Plaintiffs instituted this action in September 1974, in an effort to stop the Navy from dumping 2.8 million cubic yards of admittedly polluted spoils into the Sound just off New London, and to seek the use of alternative sites a few miles further from the shore involving less of a threat to coastal nursery and spawning areas. Plaintiffs' principal claims were (1) that the Navy and the Corps of Engineers had failed procedurally to comply with NEPA in reaching the decision to dump at New London, and (2) that the Corps violated Section 404 of the Water Act [33 U.S.C. §1344] in issuing a permit for dumping at that site.

After a three-day trial and the submission of briefs, the District Court denied plaintiffs' request for injunctive relief, and final judgment was thereafter entered dismissing the action [A. 109]. Plaintiffs appeal from the denial of injunctive relief and the judgment pursuant to 28 U.S.C. §1291. The State of New York has joined in the appeal as an intervenor before this Court.

B. Statement of Facts

This case finds its origin in the proposal of the Navy to dredge a deeper and wider channel in the Thames River at New London, Connecticut, in order to accommodate a new class of submarine, the so-called SSN 688 class. The first of these submarines is now scheduled to arrive at New London sometime in 1976 [A. 40].

The overall dredging project contemplates the deepening of the Thames River channel for a total distance of 7.5 miles -- from the River's confluence with Long Island Sound to the Navy's Submarine Base in Groton [A. 407]. The work itself will be undertaken in two distinct phases. The first, now in process, involves the dredging of the Thames from Long Island Sound northward to the Underwater Systems Center, where the new submarines are apparently to be equipped. That work is expected to be completed in the spring of 1975. Then a hiatus of nine months is projected until early 1976,

when the second phase of the dredging -- involving the most seriously polluted spoils -- will begin. This phase will cover the channel northward from the Underwater System Center to the Submarine Base, and is expected to require approximately one year's work [Exh. 20, p. 1].

Altogether, some 2,800,000 cubic yards of bottom muds and sediments are to be dredged from the Thames in the two phases, equivalent, as Judge Blumenfeld described it, to a slab approximately one mile long, 300 feet wide and 50 feet high [A. 43]. Under the Corps' permit, these spoils have been dumped and, absent reversal of the District Court's judgment, will continue to be dumped in the New London Dumping Ground located in Long Island Sound two miles off the Connecticut coast and a mile and a half from Fishers Island, New York [Exh. 1; A. 409-10].

If the materials to be dredged from the Thames were clean, their disposal in Long Island Sound would cause little concern. However, as the District Court stated, the spoils are polluted, "with especially high concentrations of volatile solids, industrial wastes and Kjeldahl nitrogen." [A. 44]. As a consequence, when the materials are dredged from the Thames and dumped into Long Island Sound, they admittedly contaminate the immediate disposal area. In addition, if the spoils are dispersed by current or wave

action, a much broader area and much larger marine population, may be exposed to the pollutants [A. 480-2; 488-94]. This, in turn, could result in an accumulating effect, acknowledged in the impact statement and by the experts at trial, where the pollutants could be ingested by lower organisms and passed upward in the food chain, resulting in the depletion and contamination of shellfish and other marine resources [A.420, 422, 424-5,493-4]. For this reason, among others, the selection of the New London fishing site, with its close proximity to nursery and shellfish along the Connecticut coast, seemed to plaintiffs an especially poor one.

When the Navy first began to look for a disposal site, these concerns were not a propos because New London was not considered as a dumping site. In a 15-page draft EIS issued in January 1972*, the Navy indicated that the dredged material would be disposed of 23 to 50 miles offshore (Exh. 3)**. Following criticism by the Department of Interior,

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** This was the first of several NEPA statements issued in this case, and was followed by a revised draft impact statement, an Addendum to that,and the final EIS. For the convenience of the Court, we have set forth in Appendix A a brief chronology of the major documents and actions.

* Where items are identified without an "A" page number, they are not included in the appendix. They are, however, included in the record which has been filed with the Court. The prefix "Exh" denotes exhibits introduced at trial before the District Court, and the prefix "Tr" denotes pages of the transcript of the trial.

among others, that environmental impacts had been inadequately considered, the Navy undertook a more comprehensive study and evaluation.

A year and a half later, in May 1973, the Navy issued a lengthy and detailed revised draft impact statement which identified the Brenton Reef Dumping Ground in Rhode Island Sound as the most environmentally suitable for spoil disposal, and indicated the Navy's willingness and intention to use the site [A. 381-84]. In this connection, the statement described the polluted nature of the spoils and concluded that it was important to use a site where the materials would be "contained", rather than widely dispersed. Brenton Reef was identified as being well-suited in this regard because of extensive studies of prior dumping there establishing excellent containment of spoils at that site [A. 381, 383, 386-8].

The detailed revised draft also addressed itself to alternative dumping sites, including the use of sites in Long Island Sound. The latter, it was concluded, would be "a poor disposal area [because] current patterns tend to retain pollutants in the Sound and gradually move them shoreward." [A. 384b]. Rather, if a different location were to be used, the revised draft suggested that a site in Block Island Sound to the southeast of Fishers Island would

be the best suited; however, Brenton Reef was preferred because of the information available on prior spoil disposal there [A. 400].

Having concluded its basic impact analysis, the Navy was not, however, free to begin its work. Under Section 404 of the Water Act, the disposal of the dredged materials at Brenton Reef or any other site in navigable waters required a permit from the Corps of Engineers*; and when application was made in this case, the Corps refused to accept the choice of Brenton Reef [A. 458]. Instead, drawing on what it acknowledged to be "sketchy" information on spoil movement in the area, and apparently concerned with the economic implications of using Brenton Reef, the Corps directed the Navy to the New London site just off the mouth of the Thames in Long Island Sound [A. 497-500]. The alternative Block Island site, which had been described as the most suitable after Brenton Reef, was apparently not considered

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* Pursuant to Section 301(a) of the Water Act [33 U.S.C. §1311(a)], the discharge of any "pollutant", including "dredged spoil" [33 U.S.C. §1362(6)], into the waters of the United States is prohibited except in accordance with a permit issued under the Act. Section 404(a) vests the Corps with authority to issue such permits for the discharge of dredged spoil at specific sites, subject, however, to compliance with environmental guidelines [Section 404(b)] and to a veto power in the Environmental Protection Agency in certain circumstances [Section 404(c)].

in this connection.

The switch from Brenton Reef to the New London Dumping Ground was announced in a two-page "Addendum" to the revised draft impact statement, which was issued in August and accompanied by a preliminary study used by the Corps [A. 402]. This study had been conducted in connection with the disposal of a nominal 92,500 cubic yards of spoil at New London in 1972. The preliminary report reviewed the work that had been done, noting that due to equipment failure, only 25 hours of current data had been collected. Drawing on this testing, the study authors indicated that it was "probable" that spoil would remain in the general vicinity of the dumpsite for the near term, but cautioned that due to the short data records, containment over the long-term could not be assured [A. 451]. A further section of the report also suggested the spoil dumped previously at New London may have been scoured away by the currents [A. 452].*

The Addendum took note of the "further investigations" and then, as an explanation for the shift to New London, stated

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* Over a 15-year period, something in excess of 3 million cubic yards of spoil had been dumped at New London. However, except for the small Navy project, the use of the dumping ground had been discontinued in 1971 [Exh. D].

that a "Scientific Advisory Committee" had been asked for advice and had "made the . . . recommendation that the New London Dumping Ground . . . should be the primary disposal site." [A. 404-5]. There was no mention of the Corps' role or any further explanation of the basis for decision. Subsequently, the Corps, which had actually made the selection, sought to correct this impression that the Scientific Advisory Committee had been responsible [A. 460], but the Addendum language was carried forward into the final impact statement [A. 412].

Following the issuance of the Addendum, two public hearings were held at which objections to the selection of New London were voiced by the State of New York, various of the plaintiffs and many other persons [Transcripts of Hearings, Exhibit 6B, App. A at 44-83; Appendix B at 56-99]. The protests did not, however, alter the decision.

In January 1974, the Navy issued its final EIS [A. 406], which was largely unchanged in its language from the revised draft which had recommended Brenton Reef. The "Alternatives" section, for example, was identical to that of the draft [Compare A. 389-401 and A. 426-38], and virtually the same language was included regarding the need for a site that could contain the polluted spoils [Compare A. 381 and A. 409]. In two critical respects, however,

there were major changes:

(a) New London replaced Brenton Reef as the designated dumping site "as a result of the recommendations of the Scientific Advisory Committee" and the consequent "directive" of the Corps of Engineers [A. 412], and

(b) the observation that Long Island Sound was a poor disposal area was deleted.

In addition, a volume of exhibits [Exh. 6B] was added, which included the transcripts of the public hearings and the Navy's preliminary spoil study, among other items.

In March 1974, the New England Division of the Corps, after first receiving clearance from Washington [A. 361-2], set the final stage of the permitting process in motion when it notified the Environmental Protection Agency ("EPA") that it intended to issue to the Navy a permit under Section 404 authorizing disposal at New London, and advised EPA that it had 15 days within which to "deny or restrict" the use of the dump site under Section 404(c) of the Water Act [A. 366]. In the same letter, the Corps also indicated its view that the selection of New London would conform with applicable criteria under Section 227.64 of EPA's ocean dumping regulations [40 CFR § 227.64].

Reading its authority under Section 404(c) to authorize denial of a permit only where it could prove the

certainty, rather than merely the risk, of "unacceptable adverse effects" on shellfish and fishing areas, EPA concluded that it could not deny specification of New London [A. 241, 369]. EPA did, however, seek to minimize what it recognized as serious risks by requesting the inclusion of five conditions in the Corps permit [A. 370-71]. Four of these were eventually agreed to, but the fifth, seeking to cover the polluted spoils with clean fill, was rejected [A. 239-40].

On April 29, 1974, the Corps issued the Navy the permit it sought, subject, however, to the establishment of a monitoring program to test for spoil movement and the development of criteria that could be used to determine whether dumping should be halted [Exh. 11]. It was further stipulated that no work could begin until the criteria were finally approved by the Corps. This approval was given on August 3, 1974, through an amendment of the permit; and on August 19, 1974, dredging and disposal began [A. 19]. A month later, the work was suspended when, the dredging company took its equipment elsewhere. However, work began again after several weeks and, as far as plaintiffs are aware, has continued apace since that time.

C. The Proceedings Below

On July 15, 1974, plaintiffs, through their

attorneys, forwarded a demand letter to the Navy, the Corps and EPA's Region I Administrator setting forth in detail their objections to the then-proposed dumping at New London, asserting the illegalities of that action, and demanding that New London be withdrawn as the disposal site [Exh. C]. These demands were rejected by letters from each agency received between August 3 and August 19, 1974; and on the latter date, as if in emphasis, dumping at the New London site began.

Two weeks later, on September 3, 1974, plaintiffs filed their verified complaint, alleging violations of both NEPA and the Water Act, and seeking an injunction against further dumping at New London [A. 3]. An order to show cause, bringing the case on for hearing on plaintiffs' motion for a preliminary injunction, was signed by Judge Blumenfeld at the same time, and the hearing was set to commence on September 11 [A. 34].

At the first day's hearing, Lieutenant Way, the Naval officer responsible for overseeing the preparation of the impact statement, testified on the manner in which the decisional process had proceeded, including, in particular, the determination to switch from Brenton Reef to New London. It was during this examination that the role of the Corps in directing the change to New London was first described, and

the initial indication given that the Scientific Advisory Committee had not "recommended" the site as such [A. 460].* Lieutenant Way also testified at this time that the actual work on the EIS had been done by a private consulting firm, and that he had acted solely in an editing capacity and had not passed judgment on the adequacy or accuracy of the consultant's environmental assessment [A. 121-123].

On September 12, after Lt. Way had concluded, plaintiffs called Dr. W. Frank Bohlen, a professor at the University of Connecticut's Marine Sciences Institute and an oceanographer who had conducted extensive research on dredged spoil movement in Long Island Sound, including studies for the Corps [A. 126-27]. Dr. Bohlen testified that based on his studies extending over four years, including testing in the dumping area, New London was not, as the impact statement had indicated, a containment site that would retain the polluted spoils. The materials, he noted, could be expected to remain stable for one or two years; but then, due to the shallow depths of the site, the relatively high bottom currents and the impact of storms, the spoil would almost certainly break up and disperse northwest towards the Connecticut shore [A. 132-34; 478-80]. This,

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* These facts were later confirmed directly by Mr. Andreliunas of the Corps when he appeared as a witness on September 12 [Tr. 270-76].

Professor Bohlen stated, was a productive fishing and nursery area; and due to the proximity of the dumpsite, the resulting dispersion of the polluted spoil would pose significant risks to the marine resources there, both directly and through uptake through the foodchain. These were risks, he thought, that should not be taken unless there were no reasonable alternatives; and in his opinion, this was not the case [A. 133-40; 480-82].

Specifically, Professor Bohlen pointed to two preferable alternatives, both outside Long Island Sound. The first of these was the site just southeast of Fishers Island in Block Island Sound, which the revised draft impact statement had identified as the most suitable alternate next to Brenton Reef. Professor Bohlen testified that this area was far more a containment site than New London because of its substantially greater depths (upwards of 200 feet as compared to the 35 to 85 foot range at New London), and the resulting protection from wave action. In addition, some testing had already been carried forward at this site; and of equal importance, it was further removed from the coastal spawning and nursery areas than the New London Dumping Ground. Therefore, he noted, even if sediment movement should occur, the impacts would be less severe because the pollutants would have a greater opportunity to dissipate -- or dilute --

before they reached the shore and its marine resources [A. 142-50; 482-83].

Using the same criteria, Professor Bohlen also suggested as a preferable site to New London a second alternate that had also been identified, but never discussed, in the final EIS -- the so-called "Acid Site" approximately 10 miles southeast of Block Island [A. 148]. During the examination of Lt. Way, it turned out that the EPA, in response to a request from the Corps, had indicated that, subject to the results of some further testing, the use of this site for the Thames River spoils would be acceptable [A. 365]; and in the final EIS, the location had been identified as an alternate that would be tested in depth [A. 412-13]. Somehow, nothing further had been done. Professor Bohlen, however, pointed out the current measurements had been taken, and that based on depth and other factors, containment was far more likely there than at New London [A. 148-50].

Finally, Professor Bohlen directed himself to the Navy's monitoring program, testifying that it could only record history, not protect against the movement of the polluted spoil, since this could not be expected to take place until the full 2.8 million yards was already dumped. At that point, he stated, it would be too late to safeguard the nearby coastal areas [A. 153-54; 483-84].

Professor Bohlen was followed by several other witnesses: Dr. Howard M. Weiss, who, through an affidavit introduced by agreement as his testimony, concurred in the conclusion that New London was not a containment site and described the adverse impact that would follow with spoil dispersal [A. 485-96]; Mr. Vito Andreliunas, Chief of Operations of the Corps' New England Division, who confirmed the respective roles of the Corps and the Scientific Advisory Committee in the selection of New London and also described how, in March 1974, the matter had been submitted to the Chief of Engineers for final approval [Tr. 266-96]; Admiral Steven White, Commander-Designate of the Submarine Base at Groton, who testified briefly on the purpose of the new 688 submarines and their anticipated arrival schedule [Tr. 350-61]; and Dr. Richard E. Smith of the Naval Oceanographic Office, who described the Navy's short-term study of spoil disposal at New London, supra, page 9 [A. 178-22]. Dr. Smith, for his part, stood by the conclusion that there would be limited movement of spoil over the short term, but acknowledged that he could not predict the long-term consequences [A. 196-97]. On cross-examination, it also turned out that Dr. Smith had not been responsible for assessing spoil transport and was, as a consequence, often unfamiliar with the details of the study, including the location of the dumpsite on the map [A. 198-201; 206-07].

The hearing concluded on September 20, 1974, with four witnesses. Mr. Edward Conley, Chief of the Permits Branch of Region I EPA, described the role that his agency had played, indicating that EPA recognized the risks of adverse impacts from the dumping, but concluded that it could not deny certification absent hard proof [A. 241]. Mr. Conley was followed by Dr. John Pearce, Chairman of the Scientific Advisory Committee and officer in charge of the Sandy Hook Marine Laboratory in New Jersey who, while acknowledging that the Committee had not "recommended" the New London site, stated that it had concurred [A. 290-93]. Dr. Pearce also defended the choice on the grounds that, environmentally, there was, in his view, no significant difference between Brenton Reef and New London, and that the latter was therefore preferable on economic grounds [A. 264-65; 291]. On cross-examination, however, it turned out that Dr. Pearce himself believed that the Navy's 25 hours of testing did not provide a valid basis for conclusion, whereas containment at Brenton Reef had been proven over five years [A. 303-04]; that he had not been aware that the currents at New London were three times greater than at Brenton Reef [A. 307-316]; that he had not focused on the fact that the New London currents, even as measured in calm weather, were in excess of those required for erosion [A. 307-08]; and generally, that in concluding that New London was as good as Brenton

Reef, he had relied on "the Corps people or the Navy people" who were recommending the switch [A. 302, 310].

Following Dr. Pearce, plaintiffs presented Mr. Charles Hardy, Research Oceanographer at the Marine Sciences Research Center, State University of New York, who had spent the last five years studying and surveying Long Island Sound and its water movement and quality. Mr. Hardy testified that based on his research, the dispersal of the spoils dumped at New London was a virtual certainty and that the site was a poor dump location for that reason. In this connection, Mr. Hardy noted, among other things, that at current speeds equal to or less than those measured by the Navy at New London, dispersal of dredged spoil had in fact taken place elsewhere in Long Island Sound [Tr. 478-94; A. 320c].

Finally, Mr. Andreliunas was recalled and gave testimony on the manner in which the Corps had considered the possible cumulative impacts of various pending or proposed spoil disposal projects at New London and elsewhere in Long Island Sound [Tr. 509-32]. The nature and magnitude of these projects were further identified by stipulations [Exh. 15, 16; Tr. 533-37]; and Mr. Andreliunas concluded with a description of the dumping that had been undertaken to date [Tr. 525-32].

Following the evidentiary hearing, plaintiffs and defendants agreed that the trial should be treated as a full hearing on the merits, with the motion for preliminary relief consolidated with the request for final judgment; briefs were filed; oral argument was presented on October 10; and the case was submitted for decision.

D. The Decision of the District Court

Judge Blumenfeld issued his Memorandum of Decision, denying plaintiffs' request for relief, on December 20, 1974.

With respect to plaintiffs' claims that Section 404 of the Water Act had been violated by the issuance of the permit, the District Court concluded that it was without jurisdiction because plaintiffs had instituted the action less than 60 days after giving notice of violation on the Navy, the Corps and EPA [A. 50-53].

With respect to plaintiffs' NEPA claims, the Court concluded, first, that the Navy had been the appropriate agency to prepare the EIS, even though the Corps was the decision-making agency, and, further, that the Navy had not acted improperly in delegating the preparation of the statement to a private consultant and retaining for itself only an editing role [A. 54-60]. In addition, the Court held

that there had been no violation of NEPA when the Corps rejected the Brenton Reef site and directed the Navy to New London before a revised EIS discussing the new site had been prepared. It was sufficient, the Court concluded, that before the Section 404 permit was finally issued, the impacts had been assessed, even though the decision had been made sometime before [A. 64-68].

Turning to the EIS itself, the District Court concluded initially that the Navy had not erred in failing to discuss the cumulative impacts of other pending or prospective spoil disposal projects at New London, because the Navy project was "a single dredging operation unrelated to any other"; and as to projects elsewhere in Long Island Sound, discussion of these was excused on the grounds that cumulative analysis was virtually impossible [A. 69-77].

In connection with alternatives, the District Court likewise found the EIS adequate, invoking what it described as a "rule of reason" to justify an admittedly sketchy, five-page analysis of available options; and invoking the same rule of reason, the Court also concluded that the Navy was under no obligation to do anything more than it did in seeking alternate dumpsites [A. 78-99].*

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* In this last connection, the Court seems to have thought that plaintiffs were recommending deep ocean sites, which is not the case. Plaintiffs urged more meaningful consideration of the Block Island and "Acid" Sites, based on the points Professor Bohlen made. However, the District Court never mentioned these.

Similarly, the Court decided that it was "simply harmless error" when the Navy misstated the role of the Scientific Advisory Committee in the EIS; and as for the claim that New London had been chosen without scientific basis, the Court simply relied on Dr. Pearce [A. 100-06].

In conclusion, the District Court held that although New London may not have been the best site, the selection was not arbitrary, and the mandates of NEPA had been met.

RELEVANT STATUTES AND REGULATIONS

The relevant statutes involved in this appeal -- Section 102(2) of NEPA and Sections 301(a), 404, 502(6) and 505 of the Water Act -- are set out in pertinent part in Appendix B to this Brief.

The relevant regulation -- Section 227.64 of EPA's Ocean Dumping Criteria that were purportedly applied in this case -- is set out in Appendix C.

POINT ONE

THE DISTRICT COURT ERRED IN DENYING ITS JURISDICTION UNDER THE FEDERAL WATER POLLUTION CONTROL ACT

As has been noted, the final Federal action which authorized the Navy to dump its spoils at New London was the issuance by the Corps of a dumping permit under Section 404 of the Water Act. Plaintiffs alleged that this permit was issued in violation of Section 404 and its implementing regulations, infra, page 24, and should be set aside for this reason, as well as for NEPA violations. The District Court, however, did not come to grips with the Water Act claims, holding that it was without jurisdiction to consider them [A. 50-52].

In reaching the conclusion that it was without jurisdiction over the Water Act claims, the District Court relied on Section 505(b) of the Act, which provides generally that no citizen suit may be commenced under the Act less than 60 days after the plaintiff has given notice of an alleged violation to EPA and the culpable party [33 U.S.C. §1365(b)]. In the instant case, plaintiffs, through their attorneys, had given notice and made demand on EPA, the Navy and the Corps by letter mailed on July 15, 1974; and having received rejections from each agency, they had commenced this action on September 3, 1974 [A. 52]. The hiatus,

however, being only 49 days, rather than 60, the District Court concluded that the statutory notice requirement had not been met and that it was, accordingly, without jurisdiction to consider plaintiffs' Water Act claims.

The District Court was clearly in error. For even if the suit had been premature under Section 505(b), the District Court had jurisdiction over the Water Act claims and the asserted wrongful issuance of the 404 permit, under the Administrative Procedure Act [5 U.S.C. §701-6], and the basic Federal jurisdictional statutes [e.g., 28 U.S.C. § 1331]. Indeed, this Court reached exactly such a conclusion when it considered an appeal from an identical lower court determination in Conservation Society of Southern Vermont v. Secretary of Transportation, _____F.2d_____, 7 ERC 1236, 1244 (Dec. 11, 1974)*. Citing to Section 505(e), which preserves all private rights to sue under any statute or common law; to the legislative history of the Water Act and its prototype, the Clean Air Act; and to cases under both laws where jurisdiction had been exercised under the APA and 28 U.S.C. §1331, this Court held:

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* Decided only two days before the present decision, and probably as yet unknown to the District Court.

> "After careful consideration we are not persuaded that Congress intended the sixty-day notice provision to erect an absolute barrier to earlier suits by private citizens under the FWPCA . . . " (7 ERC 1244)

Similarly here, where jurisdiction was generally alleged and, indeed, found for NEPA purposes under the APA and 28 U.S.C. §1331, the District Court likewise had jurisdiction over the Section 404 claims under the same statutes.

In Conservation Society, supra, this Court noted, moreover, that the purpose of the 60-day waiting period was to "provide the [EPA] Administrator time to launch governmental enforcement of the FWPCA [Water Act] in lieu of enforcement through private citizen suits." [7 ERC at 1244]. In the instant case, however, EPA, as well as the Navy and the Corps, had made it clear that they were not about to launch any governmental effort to police the Water Act. To the contrary, before plaintiffs instituted their suit, each of the agencies had rejected plaintiffs' July 15 demands, and the dumping operations had actually begun [A.. 19]. Under these circumstances, plaintiffs had no choice but to move as expeditiously as possible; and it would pervert the purpose of the 60-day rule to uphold the District Court's conclusion that because they did not wait another 11 days, there could be no review of the Water Act violation.

Nor would such a review have been an academic exercise. To the contrary, the uncontroverted evidence suggested that the requirements of Section 404 had not been met. Specifically in this connection, under Section 404(a), the Corps was (and is) entrusted with the authority to issue permits for the dumping of dredged spoil at specified sites (including New London). However, it cannot act in a vacuum; under Section 404(b), its decisions must be made in accordance with guidelines developed in conjunction with EPA.

At the time the permit for the New London dumping was considered and issued, specific guidelines under Section 404 had not been promulgated. However, EPA had issued regulations governing the ocean disposal of polluted spoil [40 CRF Part 220 et seq., published initially at 38 Fed. Reg. 28610 (Oct. 15, 1973)], and the Corps recognized these as applicable in the instant case, including, in particular, Section 227.64, which provided (and provides) in part that:

> "The [selected] disposal site must be located such that the disposal operations will cause no unacceptable adverse effects to known nursery or productive fishing areas. Where prevailing currents exist, the currents should be such that any suspended or dissolved matter would not be carried into known nursery or productive fishing areas or populated or shoreline areas." [40 CFR §227.64(a)(2)] (emphasis added).

In expressing its intention to issue a permit for New London, the Corps purported to apply the criteria of

§227.64 and to conclude that they would be met [A. 366]. Yet the facts do not support the conclusion.

To the contrary, the uncontroverted evidence in the record establishes that the areas lying along the Connecticut coast to the northwest of, and as close as two miles from, the New London dumpsite are known nursery areas [A. 132-33; 394], and the uncontroverted evidence likewise shows that the current patterns over the dumpsite, and the resulting net drift, are to the northwest into the known nursery areas [A. 132-33; 251-52; 491-92]. As a result, there is no question on the record but that the quoted criteria will be violated. Indeed, as Professor Bohlen testified, over the long-term, the suspended matter carried into the nursery areas would be both substantial and widespread [A. 133-35; 480-81]; and even the U.S. Attorney, in his brief to the District Judge, was forced to acknowledge that "drift is likely over the long term" and that due to the currents, there could be "a long term violation."

The District Court avoided the evidence and concessions noted above -- and the violations of the Water Act that were indicated -- by disclaiming its jurisdiction. That holding, however, was clearly erroneous, and must be reversed. Further, in view of what we believe to be uncontroverted evidence that violations of the governing criteria will occur, we respectfully submit that this Court can and

should direct the entry of an injunction against further dumping at New London until the requirements of the law are satisfied.

POINT TWO

THE DISTRICT COURT ERRED IN DETERMINING THAT THE NAVY WAS THE PROPER AGENCY TO PREPARE THE EIS, WHEN THE CORPS WAS THE GRANTING AGENCY AND IN FACT MADE THE SITE SELECTION

Plaintiffs asserted before the District Court that NEPA had been violated because the Navy, rather than the Corps, had prepared the EIS, whereas the Corps was the decision-making agency. The District Court rejected this contention, concluding that the Navy could properly act as "lead agency" in this instance.

Under NEPA, however, it is the "responsible [Federal] official" that is required to prepare the EIS [Section 102(2)(C)], and in the instant case, that could only have been the Corps. From the very outset, there was no question that the Corps would have to grant a permit for both the dredging and the dumping under Section 10 of the Rivers and Harbors Act of 1899 [33 U.S.C. §403]. These responsibilities of the Corps were enlarged and underscored with the passage of the Water Act, vesting it with authority over the selection of disposal sites. Thus, as a statutory matter, the Corps, not the Navy, was the responsible agency for determining

whether and under what conditions the dredging would be carried forward and where the resulting spoils would be dumped.

Under the foregoing circumstances, the Corps could not abdicate its responsibility to prepare the EIS. The Navy was simply an applicant, not the "responsible official." The Navy could not grant its own permit, nor did it choose the site.

When, therefore, the job of preparing the EIS was assigned to the Navy, there was an improper delegation of the same kind that this Court held impermissible in Greene County Planning Board v. FPC, 455 F.2d 412 (2d Cir. 1972), and Conservation Society of Southern Vermont v. Secretary of Transportation, supra.

The shortcomings of such delegation are emphasized by this case. Thus, the Navy, as has been noted, concluded through its own evaluative process that Brenton Reef was the preferred disposal site and that the Block Island Sound site southeast of Fishers Island was the next best choice. When the Corps, however, rejected Brenton Reef and directed the use of New London, the Navy dutifully did what it was bade -- as it had to if its project was to move forward -- and modified the impact statement accordingly. Yet because of the delegation, the Corps had not been party to the evaluative

process under NEPA; and its directive could not have followed from that process since New London had not even been identified.

In short, the Navy, which had prepared the draft impact statement, could not carry forward with the decision it thought environmentally preferable, while the Corps, which directed the use of New London, had not made the environmental evaluation that NEPA called for.

The fact is, of course, that in the end, the Navy, which purportedly acted as the "responsible official", really was no more than a passive bystander. It did not even attempt its own evaluation of impacts. Instead, it assigned the task to a private consulting firm, and retained for itself an editing capacity only [A. 121-23]* When the consultant found Brenton Reef the preferred site, the Navy sought permission for its use, only to be refused by the Corps. A month later, when the Corps directed the use of

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* Such a delegation of analysis to a private firm, where the purportedly responsible official exercises no more of a role than to improve punctuation, raises questions in its own right. The District Court held the use of such a consultant proper, and we do not disagree with the general proposition. But where, as here, the Navy abdicated an evaluative role altogether, we suggest that the delegation was contrary to NEPA.

New London, the Navy made no evaluation of its own, but simply issued an Addendum which, even at that, mistakenly assigned the decision to the "Scientific Advisory Committee" -- itself a creation of the Corps. Finally, faced with the Corps directive, the final EIS was issued, largely unchanged from the revised draft, but substituting New London. Meanwhile, the Corps made all the important decisions, without ever subjecting itself to the procedures NEPA called for and without disclosure of its role in the EIS.

Despite this reversal of roles and separation of the impact analysis from the decisional process, the District Court concluded that the Navy's preparation of the EIS was not clearly in error [A. 56], and that in any event the "purposes and policies behind NEPA were fulfilled in this case." [A. 57].

In reaching these conclusions, however, the Court did not address itself to the Corps' permit granting responsibilities and the Navy's position as an applicant, nor did it come to grips with the realities of the Navy's passive role. Most importantly, it took no account of the fact that if the impact evaluation process is separated from the actual decision making the protections that NEPA is designed to ensure are nullified. Yet, that is exactly what happened here -- and in that regard, the purposes and policies behind

NEPA were not, and could not have been, fulfilled.

POINT THREE

THE DISTRICT COURT ERRED IN CONCLUDING THAT THE EIS WAS ADEQUATE WHEN IT FAILED TO MENTION, MUCH LESS DISCUSS, OTHER PENDING AND PROPOSED DUMPING PROJECTS AT NEW LONDON AND ELSEWHERE IN LONG ISLAND SOUND

The polluted Thames River spoil being dumped by the Navy, massive as it is, is just one part of a much larger quantity of spoil projected for dumping at the New London site and elsewhere in Long Island Sound.

Within the Thames itself, for example, the Corps has plans to further deepen the channel that the Navy is dredging now. This will generate 1,400,000 cubic yards of additional spoil, with the New London site admittedly a prime candidate as a dump site [Exh. 15]. The Electric Boat Division of General Dynamics, which is assembling one of the first SSN 688 submarines, has also applied to dredge 300,000 cubic yards of spoil from the Thames adjacent to its plant, and to dump the spoils at the New London site. The Coast Guard has a separate proposal, involving 190,000 cubic yards of spoils, which, according to the Coast Guard's Draft EIS issued in February 1975, will also utilize the New London Dumping Ground. Further, there was, at the time of trial, a pending permit application to dump 67,000 cubic yards of spoil at New London, and the likelihood of maintenance

dredging before 1980 involving still another 200,000 cubic yards [Exh. 16].

Moreover, in Long Island Sound as a whole, there are even greater amounts of spoil involved. Since January 1972, more than 2,000,000 cubic yards of spoil from several dredging projects have been dumped in the Sound, with 13,000,000 more contemplated over the next eight to ten years, exclusive of the potential at New London just described [Exh. 16 and stipulation read into the record at Tr. 533-37].

Despite the magnitude of such dumping, the Navy's EIS did not once refer to the overall amounts of spoil currently destined for the Sound; nor was any effort made to assess the impacts of the Corps' project -- or any others in the Thames -- in conjunction with the Navy's proposed work*. Instead, all that was said in the EIS -- and this only as a reprint of a brief response to comments on the draft EIS made in 1972 -- was that time pressure required the Navy project to "proceed alone" without taking the Corps project in the Thames into account [Exh. 6B, App. I, p.1]. (Since the Navy's second phase of dredging, supra pp. 5-6, will not

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* Once again, illustrating that the Corps, not the Navy, should have drafted the EIS.

occur until 1976, the time pressure is gone.)

The Navy's failure even to mention other dumping activity at the New London site and the rest of Long Island Sound is contrary to the CEQ Guidelines for the preparation of Environmental Impact Statements. The Guidelines emphasize the obligations of agencies to consider the "overall, cumulative impact of the action proposed, related Federal actions and projects in the area, and further actions contemplated" [40 CFR §1500.6(d)] (emphasis added). The Guidelines go on to note that in many cases "broad program statements will be required in order to assess the environmental effects of a number of individual actions in a given geographical area [40 CFR §1500.6(d)] (emphasis added); and they further direct that the "interrelationships and cumulative environmental impacts of the proposed action and other related federal projects shall be presented in the statement [40 CFR §1500.8(a)(1)].*

Of equal importance, the Navy's own environmental regulations are to the same effect, stating with respect to EIS preparation that:

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* Note also the requirements of the Intergovernmental Cooperation Act of 1968, 42 USC §4201 et seq., setting forth congressional policy on interrelated projects.

> "The point is that a large overview should be maintained toward the magnitude of environmental effects, both of the immediately contemplated action and of future actions for which the proposed action may serve as a precedent or have a cumulatively significant impact." [OPNAVINST 6240.2c, §1b (Oct. 4, 1972)].

In light of the CEQ Guidelines, the Navy's own regulations and the general purposes of NEPA, it seems inescapable that the Navy's EIS should at least have mentioned and addressed those projects that contemplated the use of New London as a dumping site, for the geographical and precedential relationships between the Navy's project and the other proposed work were apparent. Furthermore, since, as the District Court noted [A. 75], there was authority indicating that Long Island Sound is a "total ecosystem" tied together by currents and food chains, at least some mention of this relationship would also seem to have been required.

The District Court concluded, however, that the Navy was not required to discuss any of the other projects at New London or elsewhere in Long Island Sound, holding, as to New London, that the Navy project was separate and distinct from any other and, with respect to the Sound as a whole, that lack of feasibility excused the Navy from discussing the potential cumulative effects [A. 74-77].

It would perhaps be enough of an answer to the proposition that the Navy's work is separate from all others to point out that even if this were so, given the geographical identity of the dumping site, the CEQ Guidelines, as well as the Navy's regulations, would require disclosure and discussion. More to the point, however, the Navy dumping at New London, which had been all but abandoned as a disposal site before the current project, could not help but serve as a precedent for further dumping there, on the grounds that used dumpsites are the best to employ;* and indeed, within the last month, the Coast Guard has proven this by tying its own application to the Navy's use of the site.

The interrelationships between the Navy project and other dumping at New London also affect the potential solutions. For example, the use of a containment island for spoil disposal was rejected as an alternative in the EIS -- despite successful efforts underway elsewhere [A. 436] on the ground of costs in particular. However, in a statement made at the public hearings on the EIS in September 1973, the National Marine Fisheries Service, after first emphasizing the environmental benefits that would follow from the use of such islands, then directed itself specifically to costs, stating:

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* In fact, this appears to have been one of the rationales for using New London for the Navy spoil, though the EIS never said so, and as indicated, the site had been virtually unused since 1971.

"It appears to us that if cost sharing with the potential benefactors [of the containment island] was utilized and the cost spread over the life of the island, the cost-benefit relationship, when weighed with the environmental advantages would strongly indicate that islands are a positive course of action. The precedent for this type of action is not new as the Corps has similar projects now underway in the Great Lakes and Chesapeake Bay areas. The National Marine Fisheries Service believes that this alternative to open ocean dumping should be fully explored with a view towards utilization and in mind of the expanding need for spoil disposal sites along our shores." [Exh. 6B, App. B, p.55]. (emphasis added).

All of this, however, was never addressed in the EIS, because the Navy continued to treat its own project in isolation; and the District Court concluded -- improperly, we submit -- that no more was required. [See Greene County Planning Board v. FPC, supra].*

With respect to impacts in Long Island Sound as a whole, we agree that NEPA does not require the impossible (See Decision at A.76). At the same time, however, the EIS never claimed any impossibility in measuring such impacts -- it simply did not address them. If it had, and had then

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* It is interesting to note that the Distrct Court took cognizance of the contention that in the context of total spoil disposal, container islands could well commend themselves [A.70]. However, after mentioning the point the Court never dealt with it. Similarly, when it later concluded that the EIS discussion of the island alternative was adequate, it placed great reliance on the supposedly "high costs" -- forgetting altogether the comments of the Marine Fisheries Service [A.86]. In addition, the Court concluded-- without support in the EIS -- that environmental risks from spoil dispersal, similar to those for ocean dumping, would be involved [A.86]. But the whole point of containment islands is exactly to avoid these effects, as the Marine Fisheries Service pointed out [Exh. 6B, App. B, pp. 54-5).

noted the inherent difficulties of analysis absent a more detailed study, the disclosure itself would have served a purpose. For then, at least, the public and the Congress would have been alerted to the problem. See Scientists' Institute for Public Information v. AEC, 481 F.2d 1079 (D.C. Cir. 1973). As it was, however, the Navy's project was made to appear the only one in issue.

When Congress enacted NEPA, it did so, as the Court stated in NRDC v. Morton, 458 F.2d 827, 836 (D.C. Cir. 1972), to infuse in the decision-making process and government action,

> "...a comprehensive approach to environmental management, and a determination to face problems of pollution 'while they are still of manageable proportions and while alternative solutions are still available' rather than persisting in environmental decision-making wherein...environmental decisions 'continue to be made in small but steady increments' that perpetuate the mistakes of the past without being dealt with until "they reach crises proportions." S. Rep. No. 91-296, 91st Cong., 1st Sess. (1969), p.5.

In the instant case, however, a comprehensive approach was never taken, and incremental decision-making was the rule. This was, we submit, inadequate, and the District Court erred in upholding it.

POINT FOUR

THE DISTRICT COURT ERRED IN FAILING TO ENFORCE THE PROCEDURAL REQUIREMENTS OF NEPA WHICH MANDATE THAT AN IMPACT STATEMENT ACCOMPANY PROPOSALS FOR FEDERAL ACTION AT EACH STAGE OF THE DECISION-MAKING PROCESS

The essential fact about this case and the selection of New London as a dumping site is that the NEPA procedures were short-circuited. Thus:

1. In May 1973, the Navy issued its revised draft EIS which settled on Brenton Reef as the preferred dumping site, and recommended as the next best alternative the site in Block Island Sound (known as Site 3) southeast of Fishers Island. The New London site was not mentioned.

2. When the Navy went to the Corps for the Section 404 permit required for dumping at Brenton Reef, the Corps rejected the choice and did not address itself to Site 3. Instead, it directed the Navy to dump its dredged spoils at New London, although no impact statement was then available discussing the proposal.

3. Six weeks later, the Addendum was issued announcing the change to New London and assigning, mistakenly, as the basis of the choice, the recommendations of

the Scientific Advisory Committee. Shortly afterwards, two public hearings were held on the issuance of a Corps permit.

4. In January 1974, the Navy issued its final EIS, including as an exhibit the short term Navy study and confirming the choice of New London. Thereafter, in April 1974, the Corps issued a Section 404 permit for New London.

Taking the facts substantially as set forth above, the District Court concluded that as long as all necessary information was before the Corps at the end, when it issued the permit (not when the evaluation and decision was made), and such information was supplied and considered in good faith, the procedural requirements of NEPA were satisfied.

The District Court said:

> "Assuming arguendo that all of the necessary environmental data was at hand before the permit issued, the court is unwilling to invalidate the Corps' action as long as the Navy supplied and the Corps considered the data in good faith. If it were acting in good faith, the Corps would presumably reevaluate a decision if subsequent information showed it to be mistaken. And as long as this evaluation of all the necessary input occurs before the permit issues and the decision is finalized, it should not matter when the Corps 'decides' to use a particular site." [A. 66].

In reaching such a conclusion, the District Court, we submit, ignored the basic processes mandated by NEPA --

processes which, as the Courts have held, are not inherently flexible, but must be strictly enforced [Calvert Cliffs' Coordinating Committee v. AEC, 449 F.2d 1109 (D.C.Cir., 1971)]. Chief among these mandates is the requirement that the impact statement accompany the proposal for a federal action at each stage of the decision-making process. In this way the agency decisionmakers will be made aware of the environmental implications of their actions before those key decisions are made.

The purposes of the NEPA process is to inject the environmental side of the story at the beginning of each chapter, not to produce an epilogue or post-hoc justification or a summary of the decision-making process.

This is apparent in the first instance from the language of NEPA itself. Section 102(2)(c)(v) of NEPA requires that copies of the impact statement "shall accompany the proposal [for federal action] through the existing agency review process." The word "accompany" is not to be read narrowly. Rather, as defined in Calvert Cliffs' Coordinating v. AEC, supra, the word "must be read to indicate a congressional intent that environmental factors, as compiled in the 'detailed statement', be considered through agency review processes" [449 F.2d at 1117-18].

Moreover, the D.C. Circuit went on to say that compliance with NEPA "to the fullest extent possible" in the words of the statute,

> "would seem to demand that environmental issues be considered at every important stage in the decisionmaking process concerning a particular action - at every stage where an overall balancing of environmental and nonenvironmental factors is appropriate and where alterations might be made in the proposed action to minimize environmental costs" [449 F.2d at 1118].

In Greene County Planning Board v. FPC, supra, this Court placed particular stress on NEPA's requirement that the impact statement "accompany" the proposal through the decisionmaking process when it ordered the FPC to prepare a detailed impact statement before the FPC examiner issued his initial decision and to allow intervenors an opportunity to comment on the statement. Quoting Calvert Cliffs', the Court interpreted Section 102(2) of NEPA as

> "a mandate to consider environmental values at every distinctive and comprehensive stage of the [agency's] process. . . [and to produce] a single coherent and comprehensive analysis which is itself subject to scrutiny during the agency review process." [455 F.2d at 420-421].

[Accord, Harlem Valley Transportation Ass'n v. Stafford, 500 F.2d 328, 336 (2d Cir. 1974)].

Finally, the CEQ Guidelines admonish agencies to "keep in mind" that draft impact statements "are to serve as a means of assessing the environmental impact of the proposed agency actions, rather than as a justification for decisions already made." [40 CFR §1500.7(a)].

It is within this context that the Navy issued its draft EIS, circulated this statement, received comments and, on the basis of the data compiled, prepared and issued its revised draft EIS with its choice of the Brenton Reefs site. It is this revised draft EIS which "accompanied" the Navy proposal when it was submitted to the Corps in order to secure a Section 404 permit. At that point, the Corps -- considering the evidence in the EIS before it which had been properly processed through the NEPA funnel -- could have ratified the choice of Brenton Reef or turned instead to Site 3, the best alternate, or some other site considered in the EIS. The Corps, however, went completely outside the NEPA process by choosing a dump site, New London, which was not even mentioned in the EIS, much less presented to reviewing agencies as a possible choice for their scrutiny and comments. The revised draft EIS, rather than accompanying the Navy's proposal and constituting the basis for the Corps decision, was discarded by the Corps; and when the selection

of New London was made instead, there was no EIS to accompany that proposal through the decision-making process. As a consequence, the mandates of NEPA could not be and were not complied with.*

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* The lack of compliance was compounded by the misuse of the Scientific Advisory Committee which followed directly from the sudden break in the NEPA chain. In the absence of meaningful supporting data or other environmental bases for the switch, the Navy was forced to bolster the change by reliance on a group of scientists. The Committee was thus described as having recommended the New London site, when in fact it had not done so. The impression, however, was left that a scientific decision had been made -- and this was not even corrected in the final EIS (see p. 12, supra). Indeed, it was only on trial that true facts were made public, but by then, the Federal action had already been taken.

POINT FIVE

THE DISTRICT COURT APPLIED AN IMPROPER STANDARD OF REVIEW TO THE DISCUSSION OF ALTERNATIVES CONTAINED IN THE EIS AND ERRED IN HOLDING THAT THE DISCUSSION WAS ADEQUATE UNDER NEPA

The breakdown in the NEPA processes in this case was nowhere more apparent than in the treatment of alternatives in the EIS. Yet the District Court concluded that the five-page discussion of the subject in the EIS was adequate, using as a standard of review what it characterized as a "rule of reason". [A. 79-98].

This procedural rule of reason, we submit, was an improper departure from the standard that courts have long enforced under NEPA -- namely, that the processes mandated by the statute are not inherently flexible and must be strictly enforced [Calvert Cliffs v. AEC, supra; Greene County Planning Board v. FPC, supra].

There is no question, of course, that the consideration of alternatives, and their development and analysis in the EIS, are key facets of the NEPA processes. Thus, Section 102(2)(C)(iii) requires a detailed statement of "alternatives to the proposed action"; and this mandate is underscored by Section 102(2)(D) requiring that agencies "[s]tudy, develop and describe appropriate alternatives

to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." The CEQ Guidelines likewise call for a "rigorous and objective evaluation of the environmental impacts of all reasonable alternative action" [40 CFR §1500.8(a)(4)]; and this Court identified and lent further emphasis to the critical importance of the study of alternatives in Monroe County Conservation Society v. Volpe, 472 F.2d 693 (2d Cir. 1972), when it declared:

> "The requirement for a thorough study and a detailed description of alternatives, which was given further Congressional emphasis in §4332(2)(D)[102(2)(D)], is the linchpin of the entire impact statement." [472 F.2d at 697-8].

The District Court took note of the relevant statutes and cases; but rather than undertaking a "searching inquiry" [Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416-17 (1971)], or enforcing a strict standard of compliance in its review of the EIS, the District Court reverted to what it called a "rule of reason" to explain and justify the cursory treatment that the EIS gave to alternatives.

For its authority in support of the rule of reason, the District Court drew primarily on the case of NRDC v. Morton, supra. There, in reviewing the adequacy of an

Interior Department impact statement covering a large-scale offshore leasing program, the Court stated that the discussion of the environmental effects of alternatives need not be exhaustive and that remote and speculative alternatives need not be discussed at any length [458 F.2d at 836-38]. But the Court in no way suggested that the discussion of reasonable alternatives could be short-circuited. This, however, is what happened in the Navy's EIS and what the District Court has erroneously condoned through its decision.

Turning specifically to the consideration of alternatives in the impact statement, the EIS reviews and disposes of 14 different approaches in five and a half pages. Some of these alternatives may be "remote and speculative" within the meaning of NRDC v. Morton, and thus justify the cursory treatment given them.* There is no doubt, however, that at least three alternatives were highly

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* As noted, however, at pp. 37-38, supra, at least one of these alternatives -- containment islands -- was deemed feasible and desirable by the National Marine Fisheries Service. Further, the success of such alternatives elsewhere was acknowledged in the EIS [A. 436]. Notwithstanding, the Navy's discussion occupied less than one-half page and used costs -- unspecified in amount -- as a basis for rejection. As the Marine Fisheries Service noted, however, on a coordinated basis, the cost-benefit ratio would be favorable.

reasonable and still lost in the "rule of reason". These were:

1. Brenton Reef
2. The "Acid" Site
3. Site 3 southeast of Fishers Island

Brenton Reef, of course, had been the prime proposal in the revised draft EIS; and the studies that had been carried out there, as well as the extremely low currents, and the long history of proven containment, clearly made it an environmentally attractive option [A. 381, 383, 386-8; Exh. 21]. Yet in the discussion of alternatives in the final EIS, the site was dropped out altogether. This was convenient for the Navy because it meant that a direct comparison between Brenton Reef and New London never had to be made; but it left the public and the decision-makers essentially in the dark. For without such a direct comparison, there was nothing to indicat in the final EIS that another and, from the environmental viewpoint, apparently superior containment site was available; and there was nothing which forced the Navy to explain the choice of the lesser locale on a scientific basis.*

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* As has been noted before, in an effort to add an appearance of scientific respectability to the change, the Navy described the switch as following from the recommendation of the Scientific Advisory Committee. Even if this had been true, however, such an unexplained recommendation could not have served as a substitute for the objective assessment which must be included in an EIS. The dangers here, for example, are well illustrated by Dr. Pearce's testimony that at the time the Advisory Committee supposedly concurred in the change, it had no meaningful scientific data before it [A. 298-312].

The District Court nonetheless concluded that there was no deficiency in the final EIS because the final statement, in its view, "incorporated by reference the discussion of Brenton Reef in the revised draft EIS." [A. 99]. In support of this proposition, the Court cited §2.22c of the final EIS. This section, which is not even part of the chapter on alternatives, reads in full as follows:

> "Areas which can be expected to meet the criteria for containing spoils are limited to the areas off Point Judith. This area contains the Dump Site originally identified to be utilized, shown in Figure 3 of the Revised Draft. The Saila, et al. study (98) of actual dumping in this area has shown that containment is achieved in this area. This provides convincing evidence as to the acceptability of this area if containment of spoils is desirable."

Nothing is said about incorporating the earlier assessment of Brenton Reef into the Final EIS, nor is anyone referred to the revised draft EIS for edification about the Brenton Reef site. At best this is an implied incorporation by reference without comparison -- a far cry from a statement that "gather[s] in one place a discussion of the relative environmental impact of alternatives" [NRDC v. Morton, supra, 458 F.2d at 834].

The Acid Site, ten miles southeast of Block Island, was identified, but never analyzed in the final EIS. Yet it had been given provisional certification by the EPA as an acceptable site for the New London spoils in October 1973 -- well before the final EIS was issued [A. 365]. Notwithstanding, there was no analysis of its pros and cons in the alternatives section or anywhere else -- merely the statement that it would be studied [A. 412-13]. In the end, however, even this was not done.

The District Court, applying its rule of reason, concluded that there was enough said about the Acid Site to satisfy NEPA [A. 95-96]. But the comments it pointed to -- briefly referring to cost differentials and raising an inference of possible technical problems -- were not part of the "detailed statement", but were merely part of the transcript of public hearings which was never circulated for agency comment or public scrutiny [Exh. 6B, App. A., p. 27].* Furthermore, there was no discussion whatever of the environmental impacts of using this site -- an absolute failing under NRDC v. Morton [458 F.2d at 834]. In its disregard

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* The reference to "technical problems" was not even part of the transcript. It was merely a comment from the Corps when it applied for certification of the Acid Site [A. 363]. The fact of the application, of course, suggests the problems were not serious, and in any event, they were never discussed in the EIS.

of these strict requirements, and adoption instead of a rule of reason which required it to infer all kinds of adverse possibilities that were never discussed in the EIS [A. 95-96], the District Court used an improper standard for review and failed to hold the Navy to the mandates of NEPA.

Turning, finally, to Site 3 in Block Island Sound southeast of Fishers Island, the EIS devoted less than a page to this alternate (and only a page and a half altogether to containment sites). Notwithstanding, Site 3 came off well in its brief treatment, affording, according to the EIS, "the best location for an alternative spoil disposal site" [A. 437]. Yet this same statement was made in the revised draft EIS [A. 400]; but when Prenton Reef was rejected, no one turned to Site 3. In the same fashion, the Site was dropped from consideration in the final EIS on the grounds that more information was available about the New London dump site [A. 437].

The District Court accepted this absence of knowledge as an excuse for not dealing with Site 3 in greater detail [A. 91-2]. Yet as Professor Bohlen testified, testing had actually been undertaken at this site over a period of four years [A. 144-5]. Furthermore, as he

stated, the site is much deeper than New London, and far more a containment site; and it has the additional advantage of being further removed from shore, so that if the spoil should move, the risks to the coastal nursery and spawning areas would be considerably less [A. 142-50; 482-83].

None of these factors were discussed in the EIS; and they were not mentioned by the District Court which appears to have become confused. Thus, it mistakenly identified Site 3 as being located in Long Island Sound and, therefore, subject to consideration only after the draft EIS had issued [A. 87-88]. In fact, of course, Site 3 is in Block Island Sound and, as has already been noted, was the prime alternate site put forward when Brenton Reef was preferred.

In the end, the District Court seems to have found the discussion of Site 3 adequate within its "rule of reason" standard because of limitations on available information and uncertainties as to the seriousness of the risk [A. 91-94]. The latter, however, and the Court's statement that the "rule of reason is also informed by the scope of the risk that the project would create", confuses the contents of the EIS with the final choice of dump site. Certainly a decisionmaker

may determine that the risk involved in a proposed action is not so great that even given lack of information as to impacts, it should be carried out. Or the other hand for the EIS to use the alleged absence of risk associated with the proposed action to limit the information about alternatives made available to the decisionmaker would be, in effect, to make the decision for the responsible decisionmakers. It would make a mockery of the whole requirement for a detailed study of alternatives.

As to the supposed limitation on information, we submit that Professor Bohlen's testimony, which was never controverted, was a clear indication to the contrary and provided standards for decisionmaking that were fully adequate if the Navy or the Corps had ever addressed them. Furthermore, if the District Court's thesis were correct that agencies need not seek out information in a case like this, Section 102(2)(D) of NEPA would have little meaning -- and it would be an open invitation to agencies to do nothing to inform themselves. Indeed, that is just what happened here. As early as 1972, the Corps had advised the Navy that use of a virgin site would require baseline testing [A. 440], and by May 1973, Site 3 had been clearly identified as a reasonable location. Yet for all of this, nothing

was ever done to acquire the pertinent further facts.

When the District Court condoned this type of sit-around conduct and concluded that a half a page discussion of Site 3 was adequate because limited information was available, it departed completely, we submit, from the proper standard of review, and improperly failed to enforce the strict procedural mandates of NEPA that are the only assurance that environmental facts will be fully considered in the decision-making process.

CONCLUSION

For the reasons set forth above, the judgment of the District Court should be reversed and the lower court directed to issue an injunction against further dumping at New London until the requirements of NEPA and the Water Act are met.

Dated: New York, New York
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Respectfully submitted,

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APPENDIX A

Chronology of Principal Events

January 1972	Draft EIS issued recommending a dump site 25 to 50 miles from the mouth of the Thames.
May 1973	Revised Draft EIS issued identifying Brenton Reef, off Newport, R.I., as the preferable dump site.
June 1973	Corps memo written evidencing choice of New London as dump site.
August 1973	Addendum to Revised Draft EIS issued identifying New London as the dump site.
January 1974	Final EIS issued confirming New London as the dump site.
April 1974	Section 404 permit issued for dumping at New London.

APPENDIX B

Section 301(a) [33 U.S.C. §1311(a)]

"Sec.301.(a) Except as in compliance with this section and sections 302, 306, 307, 318, 402 and 404 of this Act, the discharge of any pollutant by any person shall be unlawful."

Section 404 [33 U.S.C. §1344]

"Sec.404.(a) The Secretary of the Army, acting through the Chief of Engineers, may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

"(b) Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary of the Army, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 403(c), and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

"(c) The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.

Before making such determination, the Administrator shall consult with the Secretary of the Army. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection."

Section 502(6) [33 U.S.C. §1362(6)]

"Sec.502. Except as otherwise specifically provided, when used in this Act:

* * *

"(6) The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water...."

Sections 505(b) and (e) [33 U.S.C. §1365(b) and (e)

"Sec.505.(a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf--

* * *

"(b) No action may be commenced--
(1) under subsection (a)(1) of this section--
'(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or
'(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 306 and 307(a) of this Act. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

"(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relef against the Administrator or a State agency)."

Section 102 [42 U.S.C. §4322] [NEPA]

"Sec.102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall--

* * *

"(C) Include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

"(i) The environmental impact of the proposed action,

"(ii) Any adverse environmental effects which cannot be avoided should the proposal be implemented.

"(iii) Alternatives to the proposed action,

"(iv) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

"(v) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

"Prior to making any detailed statement, the responsible

"Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

"(D) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;"

APPENDIX C

Environmental Protection Agency Ocean Dumping Criteria, 40 Part 220 et seq.

Section 227.64 Disposal of Polluted Material

Polluted dredged material may be disposed of in the ocean if it can be shown that the place, time, and conditions of dumping are such as not to produce an unacceptable adverse impact on the areas of the marine environment cited in §227.60(c). When material has been found to be polluted in accordance with §227.61(c), bioassay tests may be performed when it can be shown that the results of such tests can be used to assist in setting disposal conditions. To minimize the possibility of any such harmful effects, disposal conditions must be carefully set, with particular attention being given to the following factors:

"(a) Disposal site selection. (1) Disposal sites should be areas where benthic life which might be damaged by the dumping is minimal.

"(2) The disposal site must be located such that disposal operations will cause no unacceptable adverse effects to known nursery or productive fishing areas. Where prevailing currents exist, the currents should be such that any suspended or dissolved matter would not be carried in to known nursery or productive fishing areas or populated or protected shoreline areas.

"(3) Disposal sites should be selected whose physical environmental characteristics are most amenable to the type of dispersion desired.

"(b) Dumping conditions. (1) Times of dumping should be chosen, where possible, to avoid interference with the seasonal reproductive and migratory cycles of aquatic life in the disposal area.

"(2) If the type of material involved and the environmental characteristics of the disposal site should make either maximum or minimum dispersion desirable, the discharge from and movement of the vessel during dumping should be in such a manner as to obtain the desired result to the fullest extent feasible.

CERTIFICATE OF SERVICE

I hereby certify that I have today served copies of the foregoing Brief on behalf of the Plaintiffs-Appellants on counsel for Defendants-Appellees and the Intervenor-Appellant by mailing copies thereof by first class mail, postage prepaid, addressed as follows (the same being the addresses designated for service by such counsel):

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